

Assumption, New Jersey Style

by Susan Lockwood

On December 22, 1993, New Jersey became the second state to assume the Clean Water Act (CWA) §404 wetlands protection program. The U.S. Environmental Protection Agency's (EPA) decision to approve the state's program culminated a nine-month debate in New Jersey focusing on the legal and regulatory requirements for state assumption. While the assumption affects only New Jersey, the issues and problems that arose during the negotiation process may provide lessons for other states striving to eliminate regulatory inefficiencies while maintaining a high level of environmental protection.

New Jersey's Wetlands Program

New Jersey's Freshwater Wetlands Protection Act (FWPA) was signed into law by former Governor Tom Kean on July 1, 1987. Then and now, the law is heralded as one of the most comprehensive wetlands protection laws in the nation. The FWPA mirrors §404, incorporating the terms, definitions, review criteria, and conditions for permit approval similar to those of the federal program. Furthermore, the law seeks to modify those parts of the CWA that were perceived to be responsible for continuing losses of wetlands in New Jersey.

The New Jersey law sought to address inadequacies pointed out in two studies conducted by federal agencies. In 1984, the State College Pennsylvania Field Office of the U.S. Fish and Wildlife Service (FWS) completed a case study report of the most significant wetland fillings in northern New Jersey since 1980.¹ Their case study included four projects, which cumulatively filled 84 acres of wetlands under Nationwide Permit (NWP) 26. NWPs are a regulatory short cut requiring reduced regulatory review for activities having minimal individual or cumulative environmental impacts. A second report released in 1988, by the U.S. General Accounting Office (GAO) pointed to the many destructive activities not regulated under §404.²

Seeking to address concerns such as those raised in the GAO report, FWPA was designed to reach beyond the regulation of dredge and fill material to include all other activities in wetlands including the driving of pilings, placement of obstructions, excavation and ditching, drainage or disturbance of the water table, and alteration of vegetation. The law includes the protection of "transition areas" (buffers) of up to 150 feet from the wetlands boundary and specifies that wetlands adjacent to trout production waters or endangered and threatened species habitat receive the maximum buffer. Unlike the federal NWP program, which in many cases requires only that a permittee notify the Corps before proceeding with a potentially destructive activity, FWPA requires that applicants obtain written authorization before undertaking any regulated activities. FWPA provides protection for state-listed species, in addition to those that are federally listed, by prohibiting the issuance of permits that would jeopardize the species or their habitats.

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When the program began on July 1, 1988, the state set up a system to track its permitting history. This data demonstrates that the law has significantly slowed the rate of wetlands losses in New Jersey. For example, although the state program regulated more activities than the federal program, on an annual basis from 1988 through 1992, state general permits were issued for only 89 acres of wetlands while NWP 26 alone permitted the destruction of 394 acres annually.³

The Assumption Process

New Jersey's FWPA includes a provision requiring the Department of Environmental Protection (DEP) to secure the assumption of the U.S. Army Corps of Engineers §404 program. This provision was originally included to satisfy the regulated community who perceived FWPA as another layer of regulation redundant with existing federal law. In another concession to the regulated community, FWPA grandfathered in a group of projects, thereby exempting them from state regulation. However, the law stipulated that these exemptions would end when the state assumed the §404 program. These concessions created an interesting predicament in the regulated and environmental communities. While the regulated community welcomed the regulatory streamlining, they feared the loss of exemptions. Conversely, New Jersey's environmental community feared the loss of a protective regulatory layer, but welcomed an end to exemptions.

New Jersey began discussions with EPA approximately two years before it submitted its final assumption application. The final application required the state to work out the details of several agreements about the role of federal and state agencies in the wetlands protection program. New Jersey successfully completed two Memoranda of Agreement (MOAs)—the first with EPA on program implementation and oversight, the second with the Corps defining the scope of the assumed program. EPA distributed drafts of the state's application to the Corps, FWS, and the National Marine Fisheries Service (NMFS) for comments. On March 4, 1993, with the support of several representatives of New Jersey's environmental community, the state officially submitted its application to EPA.

New Jersey's application for assumption was met with opposition from two camps: FWS and national environmental groups. While the state completed the final application, FWS prepared and distributed a 150-page document outlining areas where they believed that the state program was less stringent than the §404 program. The document emphasized FWS's belief that EPA's review of the state's application for assumption constituted a "federal action" necessitating compliance with §7 of the Endangered Species Act (ESA). Under that section, all activities or programs of any kind authorized, funded, or carried out in whole or in part by federal agencies are subject to consultation with FWS. However, since Michigan, the first state to assume the §404 program, had not undergone §7 consultation, EPA resisted entering into a process it thought was outside the requirements of §404.

At the same time, several national environmental groups, relying on information provided by FWS, jumped into the

fray. The environmental groups claimed that assumption in New Jersey would set a poor national precedent for a variety of reasons, including a lack of access to third-party appeals for permit decisions, enforcement, and program funding. The state, however, took the position that these concerns reflected an incomplete understanding of the state's program.

For example, the claim that the DEP did not afford opportunity for third-party appeals of permit decisions was based on perceived difficulties in obtaining administrative hearings. New Jersey law provides for a third-party intervenor to obtain an administrative hearing if the intervenor has a statutory or constitutional entitlement to the hearing. However, since an administrative appeal, regardless of the outcome, does not preclude an appeal through the New Jersey court system, New Jersey in fact provides more opportunity for third-party appeals than the §404 program, which forces all appellants through the federal court system.

The criticisms of the state's enforcement efforts focused on projects that were grandfathered in under the state law, and the belief that additional enforcement staff would be necessary upon assumption. The state had no jurisdiction to pursue cases that were exempt from state law. Further, since the state was already implementing and enforcing its own program, it was already fully staffed.

The funding issue centered around the future effectiveness of the state's assumed program if the budget was cut. This is not specific to New Jersey but rather an issue with which every public agency must contend. Since the state program is currently adequately funded, this is an issue to be addressed if and when conditions change. EPA can withdraw its approval of the state's assumed program if the state is no longer capable of implementing the program.

This controversy captured the interest of the media and the local environmental community. Soon, the local environmental community was calling for a halt to the state's application in order to further consider its ramifications. The state voluntarily requested that EPA extend its review period for 60 days.

As the state addressed the concerns of the national environmental groups, it became apparent that these groups opposed assumption categorically, believing that state programs are subject to more political influence than federal programs. The local groups, however, were more comfortable with the state program and more concerned about what they saw as the loss of FWS's role in protecting endangered and threatened species.

Although the state was not directly involved in the EPA-FWS dispute over §7 consultation, it did have concerns. DEP was worried about the need and the legality of having to satisfy both EPA and FWS before issuing state permits. The state made it clear that it would not accept any resolution that would result in time delays or additional requirements for permit applicants. The state also felt that the procedures for permit review, which had been working successfully for five years, were being ignored by both federal agencies.

Several months into the review of the state's application, the EPA agreed to enter into §7 consultation. Simultaneously, the state, EPA, and FWS entered into negotiations on the procedure by which FWS would be involved in the program. The state worked to ensure that its methods of assessing impacts to endangered and threatened species would not be compromised, that permitting procedures not be significantly disrupted, and that review time-frames not be lengthened. FWS was concerned with obtaining the final authority on threatened and endangered species issues. The process that they negotiated includes FWS in the review of permits that might include threatened or endangered species. However, the

process is conducted with strict deadlines to minimize delay. On December 22, 1993, the MOA was signed, §7 consultation was successfully concluded, and EPA approved New Jersey's application for assumption.

Lessons for Assumption

What can other states learn from the New Jersey's assumption experience? First, keep in mind that the federal government is most comfortable with programs that are similar to the §404 program. The provision that received the greatest scrutiny in New Jersey were those that were equivalent but not identical to the federal program. Second, keep extensive records on program implementation. New Jersey was able to answer criticisms because it could document that the specific projects that were criticized were not mismanaged. Determine who will support and who will oppose assumption, and try to address reservations early in the process. Talk to all of the federal agencies directly. While EPA can be helpful, agreement with EPA is no substitute for direct experience with the other agencies. The more FWS and NMFS have worked with the state program, the more confidence they will have in it. Finally, do not be intimidated by the assumption process. Assumption is a legally existing provision in the CWA. If you believe your state's program meets the stringency test, work to pursue it.

What can the federal government do to help states interested in assumption? The most obvious answer is that all federal agencies must accept assumption as a viable option. Moreover, all involved federal agencies should suggest changes to the assumption regulations to address any additional concerns, such as satisfying the endangered species provisions. The federal agencies must also recognize that state programs have their own requirements and processes. Therefore, while it is fair to carefully evaluate state provisions that are different than those at the federal level, it is not fair to presume that such provisions are less stringent because they are not identical to federal regulations. Finally, a source of funding would be a great incentive. States are taking on a large share of the current federal requirements to the benefit of both the regulated community and the environment. They should be rewarded and encouraged with financial support of the program, not only during the planning phase, but in program implementation.

Assumption's time has come. Now, more than ever, there is a push toward downsizing at all levels of government. Clearly, however, the process of assumption is still evolving — and will continue to require diligence and determination on the part of the interested states. Despite the hurdles, assumption is a mechanism to meld the strengths of state and federal wetlands protection programs to create one comprehensive program. •

Endnotes

¹ State College Field Office, Ecological Services (U.S. Fish and Wildlife Service). August 1984. An assessment of the Corps of Engineers' Section 404 Permit Program in Northern New Jersey. 1980-1984. 110 pgs.

² U. S. General Accounting Office. July 1988. Report to the Chairman, Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, House of Representatives. "Wetlands, The Corps of Engineers' Administration of the Section 404 Program." GAO/RCE088-110. 118 pgs.

³ The USFWS further stated, "The actual acreage impacted was likely much higher because projects resulting in the impact of less than one acre of wetlands can proceed, and undoubtedly do proceed, without the Corps being notified." U.S. Department of the Interior, Fish and Wildlife Service, New Jersey Field Office. June 1993. Draft Report, An investigation of Federally-permitted projects resulting in wetland impacts in New Jersey (1985-1992). 25 pgs.

